

VIRGINIA DEPARTMENT OF EDUCATION

ADMINISTRATION OF THE STATEWIDE

SPECIAL EDUCATION

MEDIATION SYSTEM

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ADMINISTRATION OF THE STATEWIDE SPECIAL EDUCATION MEDIATION SYSTEM

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PREFACE

Amendments to the *Individuals with Disabilities Act*, adopted by Congress in 1997, require state education agencies and local school divisions to establish procedures to ensure that a mediation process is available whenever a due process hearing is requested under provisions of this act.

In August 1997, the Virginia Department of Education (VaDOE) issued a guidance document establishing an interim statewide mediation system. On September 26, 1997, VaDOE hosted a meeting of stakeholders to identify the key issues, questions, and comments relative to developing a statewide mediation system. The participants included:

Anna-Maria Johnson	State Special Education Advisory Committee
Theresa Rebhorn	Parent Educational Advocacy Training Center (PEATC)
Darrel Mason	Hearing Officer
Nona Flynn	Parent Educational Advocacy Training Center (PEATC)
Richard Gonet	Hearing Officer
Thomas Carter	Prince William County Public Schools
Jean Howery	VA Council of Administrators of Special Education
Patrick Hanes	Virginia Bar Association
Brian Parsons	VA Board for People with Disabilities
Robert Garrity	Mediation Network
Steven Staples	VA Association of School Superintendents
Jerry Minskoff	James Madison University
Robin Hegner	VA School Boards Association
Jim Brown	Chesterfield County Public Schools
Barbara Ettner	VA Board for People with Disabilities
Liz Getzel	VA Board for People with Disabilities
Heidi Lawyer	Department for Rights of Virginians with Disabilities
H. Douglas Cox	VA Department of Education
Judy Douglas	VA Department of Education
Brenda Briggs	VA Department of Education
Don Fleming	VA Department of Education
Marsha Hubbard	VA Department of Education
John Mitchell	VA Department of Education
Robert Whytal	VA Department of Education

VaDOE shared the compilation of issues and comments with the State Council of Special Education directors who, in turn, reviewed this information with their colleagues at their regional meetings. The Council then provided their responses to the VaDOE at a meeting on December 16, 1997.

Between January and March 1998, a VaDOE team reviewed all the responses and drafted procedures for the statewide mediation system. Various groups and VaDOE special education program and compliance personnel were contacted to review the proposed plan.

PROMOTING MEDIATION

Typically, special education disputes are quite varied because they can apply to changes in students goals, implementation strategies to reach those goals, and individuals to be involved in implementing these strategies. Furthermore, these conflicts often develop quickly and have adverse consequences for the provision of services and working relationships between parents and educators (Gallant, 1982).

Since the late 1970s, there has been much interest in developing insights into the underlying causes of special education disputes and conflict management in an effort to serve students with disabilities more effectively in schools. In the early 1980s, the publications on special education conflicts that began appearing with some regularity (e.g., Kerr, 1981) suggested a major factor in the onset of special education conflicts was the lack of experience in working within the parameters of the controlling legal mandate (Public Law 94-142) passed in the 1970s. Also, there was the belief that with the passage of time, many problems related to the provision of special education services would be ameliorated (e.g., Pryzwansky, 1983).

However, as the 1980s came to a close, many observers concluded that the optimism regarding the management of special education conflicts was not warranted because data indicated a growing incidence of special education disputes. For example, in Maryland the number of special education conflicts referred to the independent hearing process increased by 29 percent from the 1984 to 1988 fiscal years (Staff, 1990).

As a result of the growing incidence of special education conflicts, many states began establishing state-sponsored mediation systems for disputes arising over the delivery of special education and related services to students with disabilities. Singer and Nance (1985) reported that early developers of state-sponsored mediation systems identified several characteristics of this special education conflict management service: mediation is a process easily understood by disputants and is a very effective and efficient process.

As special education mediation systems became operational, researchers studied them and concluded that a major attraction for mediation was that, unlike other conflict management approaches in special education, it typically fostered more harmonious relationships between parents and educators (Goldberg and Kuriloff, 1991).

In the spring of 1994, the National Association of State Special Education Directors (NASDE) polled the 50 states about special education mediation systems. Responses received from all 50 states indicated that 39, or 78 percent, provided mediation services for special education conflicts and the designs of the systems were quite varied (Ahearn, 1994). At the time of the study, Virginia was one of 11 states that did not have a mediation system. However, in the two years prior to the NASDE study, Virginia Department of Education (VaDOE) staff had disseminated to its constituents generic information about mediation and school conflicts.

As anticipated by many observers of the growing popularity of mediation for resolving special education disputes, Congress mandated in the Individuals with Disabilities Act (IDEA) Amendments of 1997 that all state educational agencies establish and implement procedures to allow disputants to mediate special education conflicts. Besides the responsibility for developing and managing a statewide special education mediation system (Mediation System), the VaDOE is also responsible for ensuring that information is disseminated to those persons most affected by the potential need for conflict resolution. To that end, the following groups will be contacted:

- **Parents.** The Parent Resource Centers will serve as an important vehicle of communication to parents. Information also will be provided to the State Special Education Advisory Committee, local advisory committees, Parent Educational Advocacy Training Center (PEATC), and parent coalitions.
- **School Divisions.** Information will be provided through superintendent's memoranda, regional meetings of directors of special education, meetings with the State Special Education Directors Council, Superintendent's Association, and associations of principals, teachers, and other administrators; and, education directors of state operated programs and the Virginia Schools for the Deaf and the Blind.
- **Groups/Agencies/Public.** The information also will be provided to hearing officers, Independent Living Centers, Virginia Board for People with Disabilities, the Department for Rights of Virginians with Disabilities, and the Training/Technical Assistance Centers.

Telecommunications such as the VaDOE Hour and other satellite broadcast options, and the VaDOE's Website, also will be used to disseminate information.

SCOPE OF THE MEDIATION SYSTEM

Mediation is a voluntary process that gives disputants the opportunity to meet with independent third-party facilitators to assist them in resolving disputes. The mediator uses a variety of problem-solving methods including clarifying issues, identifying interests, determining areas of agreement, and helping parties to self-determine an outcome. The mediator provides a problem-solving structure and process and assures that everyone will be listened to with respect. The mediator does not make decisions for the parties.

Any issue regarding a child's eligibility for special education services or their provision, scope, or delivery may be mediated at any time. During the mediation proceedings, the student's educational status remains the student's current placement unless the parents and Local Education Agency (LEA) agree to an alternative placement directed by the student's Individualized Education Program (IEP) or Individualized Family Service Plan (IFSP).

The school division may inform parents of the availability of the state's Mediation System at anytime. The school division must inform parents of mediation whenever a due process hearing is requested. If the parent(s) refuses the offer of mediation, no further action to encourage the use or explain the benefits of the mediation process is required. Parents may initiate the request for mediation with the school division at any time there is a disagreement about the services being provided. However, participation in mediation is voluntary on the part of both parties.

Timelines have not been established for the completion of the mediation process other than those for the appointment of the mediator. However, because special education regulations require that mediation not be used to deny or delay a parent's right to a due process hearing or any other rights, it is expected that the mediation process, from the assignment of the mediator to the resolution agreement, will be completed within fifteen (15) calendar days. If the parent or school division has requested a due process or expedited hearing, the assigned hearing officer will be responsible for monitoring the mediation process to ensure protection of parental rights and the best interests of the child. If the parent has filed a special education complaint, the VaDOE complaint specialist will monitor the mediation process to ensure compliance with the 60-day regulatory timeline for resolution of complaints.

VaDOE will assign a single mediator (unless co-mediation is requested) from the list of approved mediators. The mediator will be required to disclose any possible conflict of interest that may exist with any party to the dispute.

Disputants are the parent and school division representative. "Parent" is defined in accordance with the state regulations governing special education. The "school division representative" should be someone consistent with the criteria for LEA representative required for an IEP team under state regulations governing special education.

The purpose of mediation is to permit the disputants to work with an impartial third party to reach an agreement. Other individuals also may attend the mediation if the mediator believes that they can contribute to the resolution process.

Since mediation is a nonadversarial process, which offers the disputants the opportunity to communicate and resolve the issues directly with each other, attorneys and advocates may act only as advisor and not formally represent the party during the mediation session should either party bring an attorney or an advocate to the mediation session. Attorneys and advocates certainly may provide guidance to families and school divisions prior to mediation, telephone or caucus consultation during mediation, and review of the agreement following mediation.

It is very important that the mediator and the disputants be afforded the courtesy of knowing who will be at the mediation session. To that end, the disputants should notify the mediator at least one business day prior to the scheduled mediation who they will bring to the mediation session. In

order to ensure that the disputants are full participants in the mediation meeting, accommodations, including foreign language interpreters and interpreters for the hearing impaired, will be provided, if needed.

Each session in the mediation process shall be scheduled by the mediator in a timely manner, and shall be held in an agreed-upon location that is physically accessible and convenient to both disputants.

The records of special education students are confidential. The mediator may have access to the student's record, at his or her discretion, if necessary to prepare for a mediation meeting. The mediator is bound by the requirements of the *Family Education Rights and Privacy Act* to protect the confidentiality of any information secured from the review of the student's record.

The mediation resolution agreement becomes part of the student's educational record. Mediation proceedings are considered confidential and no admission, representation, or statement made during the mediation process may be used as evidence in any subsequent due process hearing or civil proceeding. The mediator will not reveal anything discussed in mediation without permission of both of the parties, unless all parties agree in writing to waive confidentiality of the agreement or other communications. Only the signed agreement may be used in future hearings or litigation.

The agreement will be signed by both parties and will be made available in the native language of the parties, in Braille, or other appropriate means of communication. It must include a confidentiality pledge, the dates for initiation of the agreement and any activities that must be completed as part of the agreement (e.g., timely revision of the IEP if necessary) and an explanation of the procedures that should be followed if one or both of the disputants do not abide by it.

OPERATION OF THE MEDIATION SYSTEM

I. Recruitment, Initial Selection, Training, Expectations, Removal, and Addition of Mediators

- A. Individuals will be recruited to serve as mediators. A recruiting notice will be developed and disseminated to selected groups informing them of VaDOE's plans to develop a list of qualified applicants who are interested in becoming mediators for the Mediation System. The recruiting notice will be accompanied by an application form that will be drafted by VaDOE personnel.

To be included in the mediator applicant pool, an individual must have a four- year college degree, reached his/her 21st birthday, successfully completed a basic mediation training program (20 hours), and mediated or co-mediated at least five cases in the past 12 months.

Procedures

- Specify those groups that should receive an application and a recruiting notice. In developing a mailing list, first consideration will be given to using the membership roster of the Mediation Network, the Virginia Supreme Court's court-certified mediators, school division superintendents, the community mediation centers, Hearing Officers, and PEATC's mailing list.
- Develop an application form to be completed by those individuals who are interested in becoming mediators for the Mediation System.
- Set a deadline for the return of completed application forms.
- Develop a recruiting notice that will provide information about the mediation system and basic requirements to be met by applicants.
- Send a recruiting notice and an application form to everyone identified on the mailing list.
- Process those completed application forms received by the specified deadline.

- B. After the applicant pool has been determined, a panel will select those individuals who will be offered training to become a mediator with the Mediation System. The selection panel will have representatives from the parent, school, and mediation communities.

Procedures

- Establish a selection panel.
- Review applications from individuals who are interested in becoming special education mediators to ensure that all required information is contained in the application.
- Return incomplete applications to applicants accompanied by a request to provide the missing information by a specified deadline.
- Screen completed applications to determine those individuals who meet the following criteria: successful completion of a four-year college program; are 21 years or older; have successfully completed a basic mediation training program (20 hours); and, have experience in mediating or co-mediating at least five cases in the past twelve months.
- Place the aforementioned individuals in an applicant pool to be considered for selection as special education mediators with the Mediation System.
- Inform unqualified applicants in writing.
- Rank applicants by assigning weights for the level of mediator training, number and type of mediation cases handled prior to applying to be a mediator for the Mediation System, and related training and experience.
- Select eight mediators, observing the Equal Employment Opportunity guidelines.
- Inform the successful applicants in writing of their selection to receive special education training from the VaDOE to be mediators for the Mediation System.
- The five runners-up to the successful applicants will be informed in writing that they were considered qualified but their services are not needed at this time. Their status and continued availability will be reviewed annually.
- Inform in writing all other applicants that they were not selected for the Mediation System.

- C. VaDOE will provide selected mediators with initial training and annual training programs to promote the delivery of quality mediation services to disputants using the Mediation System. Prospective mediators will be required to attend the initial training program to be included on the list of mediators. They will be required to attend the annual training program to remain on the list. Optional training opportunities (e.g., mentoring) will be offered periodically to the mediators. Mediators will be reimbursed for expenses incurred to attend training.

Procedures

- An initial training program will be developed for those individuals who are selected to be mediators for the Mediation System. The training program will cover a variety of topics including special education laws and regulations, mediator ethics, and the Mediation System.
- Arrangements will be made to conduct the initial training program, and prospective mediators will be informed of those arrangements as well as the mandatory attendance requirement.
- An annual training program will be developed covering updates in special education laws and regulations, mediation system operations, advances in mediation practices, mediator ethics, and revisions in the Mediation System.
- Arrangements will be made to conduct an annual training program, and mediators will be informed of those arrangements as well as the mandatory attendance requirements.
- Mediators will be informed as optional training opportunities become available.

- D. Mediator expectation agreements will be prepared annually by VaDOE personnel, and mediators will be required to sign them before beginning to work for the Mediation System. The agreements will highlight the following expectations for mediators:

1. comply with timelines for case resolutions and administration;
2. remove themselves from cases if a conflict of interest is identified;
3. observe mediation session parameters;
4. maintain confidentiality of all disputants; and,
5. participate in initial and annual training programs offered by VaDOE.

The mediator expectation agreement also will identify the grounds for removing a mediator from the list of special education mediators, and will delineate VaDOE's payment schedule for expenses incurred and services provided by the mediator.

Procedures

- Draft expectation agreement to be signed by the first group of mediators trained to provide mediation services.
- Determine a deadline for returning the signed agreements.
- Send expectation agreements to mediators to be signed and inform them of the response deadline.
- Receive signed agreements and file them.
- Annually draft a mediator expectation agreement and repeat aforementioned procedures for securing signed copies.
- Require new mediators to sign the expectation agreement after completing training to work for the Mediation System.

- E. Mediators will be evaluated annually by the VaDOE. If the performance of any mediator is rated ineffective, he/she will be removed from the list. Also, a mediator can be removed by submitting a letter of resignation, by violating a provision of the expectation agreement, or by refusing a case assignment without reasonable cause.

Procedures

- VaDOE will determine mediator evaluation procedures.
- VaDOE will develop a document that covers conditions for removal from the mediators list.
- Review the removal conditions document at each initial and annual training program and provide mediators with copies.

- F. As additional mediators need to be recruited and selected, after the determination of the initial group of mediators, the SSEMS coordinator and the Mediation Design Team will initiate a recruiting and selection process for this purpose.

Procedures

- The SSEMS Coordinator identifies the need to add mediators to the roster and the potential number of mediators required.
- The Mediation Design Team meets to review the SSEMS Coordinator's recommendation for number of required mediators and to determine recruiting and selection procedures.
- The SSEMS Coordinator implements procedures and reports results to the Mediation Design Team and initiates appointment procedures as set forth in this document.
- Any additional mediators will be subject to the same training requirements and service expectations as set forth in this document.

II. Initiation of the Mediation Process

- A. If both the parents and school division are willing to mediate a special education dispute in which they are involved, a division staff member will request services from the Mediation System by submitting a services request form to the system's coordinator. The services request form will require the LEA to: (1) specify the involved disputants and student's name; and (2) indicate interpreter needs and accessibility needs (if any) for the mediation session. Both disputants are required to sign and date the request form. The request form must also include the submission date and information for contacting the involved disputants.

If the student is currently receiving special education services, the LEA will submit a copy of the IEP with the services request form for those disputes involving students with identified disabilities.

Upon receipt of the form, VaDOE personnel will record the date of receipt. Interpreters will be obtained by the VaDOE, if needed. VaDOE personnel will contact the agency's Complaints and Due Process Office to determine if there is a pending due process or complaint action. VaDOE personnel will provide the mediator with the name and contact information of the hearing officer. Information regarding interpreters and status of any other conflict management services will be recorded on the services request form.

Procedures

- VaDOE staff develops a mediation services request form, mediator notice form, and supporting documents to process a referral.
- LEAs are provided copies of the request form and directions on how to complete the form.
- Copies of the mediation request form and related information are placed on VaDOE's website.
- VaDOE will process the request form and complete the mediator notice form with each referral received.

- B. Within two working days following receipt of a request for mediation services, VaDOE will assign a mediator giving particular attention to geographic location, previous assignments, and availability. VaDOE will send to the assigned mediator: mediator's notice; copy of the mediation services request form; mediator instructions; report form; mediation parameters guide; information about disputant's involvement (if any) with any other conflict management services and related information; and a copy of the IEP when provided by the LEA. Written notice of the mediator's assignment will be sent to the disputants.

III. Conducting Mediation

In the Statewide Special Education Mediation System, mediators may only provide services in accordance with the procedures outlined in this document.

- A. The mediator is responsible for informing the disputants of the scope of the services provided by the Mediation System. The VaDOE provides the mediator with a description of the parameters of the mediation services. The mediator is responsible for scheduling the meeting with the disputants at a time and place that are convenient and accessible to both parties. The mediator shall provide this information to the VaDOE on the mediator notice form. The mediator is also responsible for notifying the hearing officer of these arrangements if a due process hearing was requested, and for notifying VaDOE's Complaints and Due Process Office of these arrangements if a complaint has been filed with VaDOE.
- B. Parents may request school staff members to attend the mediation session, but subject to agreement by the LEA.
- C. Disputants should inform the mediator of those participants and observers who they would like to attend the mediation session at least one business day prior to the start

of the session. The mediator is responsible for informing disputants of all individuals who will be present at the mediation session.

- D. The mediation session (e.g. number of sessions, ground rules) is left to the discretion of the mediator. A protracted mediation may be scheduled over multiple sessions at the discretion of the mediator.
- E. The mediator strives to facilitate resolution of the special education dispute. The approaches used to resolve the dispute are left to the discretion of the mediator. The mediator may terminate the mediation process at any point if resolution appears unlikely. If the mediator terminates the mediation process, he/she informs the disputants in writing of their due process and formal complaint options for resolving the dispute.

Procedures

- Prior to starting the session, the mediator reviews his/her goals for the mediation process with the disputants.
- At the beginning of the mediation process, the mediator establishes ground rules for the session.
- As the need arises, the mediator makes decisions regarding the conduct of the mediation and informs disputants of his/her decision.

- F. A successfully mediated resolution to a special education dispute must be drafted using a standard agreement format provided by VaDOE. Prior to signing the agreement, the disputants can request third-party consultation. The mediator will identify the deadline for completing the consultation. The mediator keeps the original copy of the agreement and provides both disputants with copies. If requested, VaDOE will have the agreement document translated into the parent/guardian's native language, braille, or other communication formats.
- G. Upon completion of a case, whether it is resolved or not, the mediator will provide information to VaDOE using a standard report form. In completing the report about a resolved case, the mediator will furnish data that include the following:
 - number and length of mediation session(s);
 - description of any third-party consultation;
 - key issues in the dispute;

- agreements reached;
- requests for interpreter and translator needs; and,
- document translation.

For unresolved cases, the mediator will complete relevant sections of the report about the number and length of sessions, and a list of the key issues in the dispute.

The mediator is responsible for submitting the report to VaDOE within 10 administrative days of the date on which agreement was signed in a resolved dispute or the termination of the mediation process in an unresolved case.

IV. Payment of Mediation Costs

The VaDOE will pay the costs of the mediator¹, interpreter, and translator costs as follows:

- A. Mediators will be compensated by VaDOE for preparing assigned cases for mediation at the rate of \$150 per case. Mediators will be paid for preparing a case even if for some reason it is terminated prior to mediation.
- B. Mediators will be compensated by VaDOE for conducting assigned mediation cases at the rate of \$400 per case. This will be a straight fee, regardless of the number of actual meetings necessary to conclude the case.
- C. Mediators will be compensated by VaDOE according to state reimbursement guidelines for personal expenses associated with conducting assigned mediation cases.
- D. VaDOE will pay directly for the services of non-English language interpreters and interpreters for the hearing impaired for services rendered at mediation meetings.
- E. VaDOE will pay directly for the translation of mediation agreements into the parent/guardian's native language or other communication formats. VaDOE will provide Braille translations at the request of the mediator.

¹If co-mediation is used, compensation will be split between the two mediators.

- F. VaDOE will not compensate the disputants for any expenses, including the cost of any third-party consultations, advocate's fees or attorney's fees. Attorney's fees may be included in a mediated agreement; however, mediators do not have the authority to award attorney's fees.²
- G. VaDOE will pay the mediator after receiving a request for payment directly from the mediator. The mediator must submit the request for payment within 10 administrative days of the completion of the case on a standard form developed by VaDOE. Minimal information solicited on the form will require verification that the case was prepared, the number of mediation meetings (if any), the number of meeting days (used to establish the total per diem expense amount to be paid), and actual mileage traveled to meetings.
- H. VaDOE will pay interpreters (for hearing impaired and non-English speaking disputants) upon receiving directly from the interpreter an invoice or request for payment.
- I. VaDOE will pay translators for translating of mediation agreements into non-English languages or other communication formats upon receiving directly from the translator an invoice or request for payment.

V. Monitoring Mediation Cases

- A. In order to monitor the timelines for the Mediation System, VaDOE will maintain a log or computerized data tracking system for each case. This log will indicate the date of the receipt of the request, the name of the mediator assigned to the case, the date the case was completed, the date of receipt of the final report, and the date of receipt of the mediator's request for payment.
- B. VaDOE will not be responsible for monitoring the implementation of the agreement between the disputants. If an issue(s) in the agreement needs to be incorporated in the student's IEP, then that portion(s) of the agreement is forwarded to the IEP team for its consideration. Implementation of the student's IEP is subject to the federal and state regulations governing special education.

If the issue(s) in the mediation agreement is non-IEP related and one of the parties

² The Individuals with Disabilities Act (IDEA) allows a court of appropriate jurisdiction to award reasonable attorney's fees to parents who are the prevailing party in a proceeding under §1415 of IDEA, which is the section that addresses mediation and due process. Notwithstanding this provision, the issue of whether or not there can be a "prevailing party" in mediation for purposes of assessing attorney's fees has not been directly addressed in our jurisdiction.

defaults on the agreement, the options for resolving the default are to request another mediation session and/or initiate action in the local court of jurisdiction. The default in the agreement may not be the subject of a special education complaint or due

process hearing. The complaint process may, however, investigate allegations of procedural violations of the underlying dispute. The due process hearing system may be accessed to resolve issues of appropriateness related to the same dispute.

- C. The evaluation of the mediator will be based on the mediator's adherence to the expectation agreement and the satisfaction of the disputants. VaDOE will develop evaluation strategies for this purpose.

VI. Reporting Statistical Summary

VaDOE will annually report summary information about mediation activities. At a minimum, the information will include the following data elements:

- period covered by the report;
- number of mediation requests;
- number of cases resolved through agreements;
- number of cases terminated without resolution;
- number of cases by LEA region;
- number of cases by LEA/State Operated Programs (SOPs);
- average cost per case;
- average number of meetings per case;
- issues resolved;
- issues unresolved; and,
- number of cases by each mediator.

VII. Providing Technical Assistance

VaDOE personnel will provide ongoing technical assistance to mediators and users of the Mediation System. Technical assistance will be coordinated by a designated VaDOE staff person, but may be provided, as well, by other program and compliance individuals.

EVALUATION OF THE MEDIATION SYSTEM

The Mediation System will be evaluated on an ongoing basis. The scope of the evaluation will be developed by VaDOE staff. Evaluation questions will be developed, and the data needed to answer the questions will be identified along with a plan to collect it.

Mediation System evaluation activities will be ongoing as defined by the evaluation scope and design. Information about the system will be analyzed, and recommendations for system improvements will be developed and reported.

REVISION OF THE MEDIATION SYSTEM

VaDOE will revise the mediation system, as appropriate, based on information gathered from the system evaluation.

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